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 LEGAL, EDUCATION & RESEARCH PROJECT; K.L.E.S.;
 C.V.; J.B.; AND JOHN DOE

**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

EROTIC SERVICE PROVIDERS LEGAL,
 EDUCATION & RESEARCH PROJECT,
 K.L.E.S.; C.V.; J.B.; AND JOHN DOE,

Plaintiffs,

vs.

GEORGE GASCÓN, in his official capacity as
 District Attorney of the City and County of San
 Francisco; EDWARD S. BERBERIAN, JR., in
 his official capacity as District Attorney of the
 County of Marin; NANCY E. O'MALLEY, in her
 official capacity as District Attorney of the
 County of Alameda; JILL RAVITCH, in her
 official capacity as District Attorney of the
 County of Sonoma; and KAMALA D. HARRIS,
 in her official capacity as Attorney General of the
 State of California,

Defendants

Case No.: 4:15-CV-01007 JSW

**PLAINTIFFS' OPPOSITION TO
 THE ATTORNEY GENERAL'S
 MOTION TO DISMISS**

Hearing Date:	August 7, 2015
Time:	9:00 a.m.
Dept:	5, 2d Floor
Judge:	Hon. Jeffrey S. White
Trial Date:	Not set
Action Filed:	March 4, 2015

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1 **OPPOSITION**

2 **INTRODUCTION / SUMMARY OF ARGUMENT**

3 This is a case about liberty. It is about the right to be let alone (*Bowers v. Hardwick*,
4 478 U.S. 186, 199 (1986)(Blackmun, J., dissenting), about controlling one's own destiny
5 (*Lawrence v. Texas*, 539 U.S. 558, 578 (2003)), and about limiting the role of the State in
6 certain spheres of our lives (*Lawrence*, 539 U.S. at 562).

7 Plaintiffs are adults who knowingly wish to engage in sexual relationships, and they
8 are willing to pay or to be paid in connection with these encounters. California currently
9 makes such conduct illegal, even though adult Americans enjoy substantial protection in
10 deciding how to conduct their private lives in matters pertaining to sex. Plaintiffs have thus
11 come to this Court to challenge the State's intrusion on their private, intimate lives.

12 The Defendants (collectively, the "State") have moved to dismiss Plaintiffs' claims.
13 The State claims that its ban on prostitution is a valid regulation of commerce that does not
14 infringe upon any liberty interest of its citizens.

15 The State's Motion should be denied because it is a promise of the Constitution that there is a
16 realm of personal liberty which the government may not enter (*Lawrence*, 539 U.S. at 562
17 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 847 (1992))), and
18 California's ban on prostitution breaks that constitutional promise.

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I. Under the Due Process Clause of the Fourteenth Amendment and *Lawrence v. Texas*, the State cannot criminalize consensual, adult, sexual activity that occurs in private, even if it occurs for compensation.

The Due Process Clause of the Fourteenth Amendment of the Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” Nearly a century ago, the Supreme Court noted that “this Court has not attempted to define with exactness the liberty thus guaranteed [by the Due Process Clause of the Fourteenth Amendment].” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Cases over the past century have applied the Due Process Clause in various contexts, and the Court recently pronounced its understanding of the Clause thusly:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, *and certain intimate conduct*.

Lawrence v. Texas, 539 U.S. 558, 562 (2003) (emphasis supplied); *see also* Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1937 (2004) (“Justice Kennedy’s opinion for the Court in *Lawrence* instead suggests the globally unifying theme of shielding from state control value-forming and value-transmitting relationships, procreative and non-procreative alike”).

In its motion to dismiss, the State ignores *Lawrence* and its impact on substantive due process jurisprudence. Instead, the State would have this Court allow it to run roughshod over the privacy of its citizens, regulating what happens in a bedroom as if it were the public square. (*See generally* Motion, p. 10).

The importance of *Lawrence* stems from its emphatic rejection of these illiberal principles and the case that once condoned them, *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court held that Georgia’s criminal prohibition of sodomy was constitutional. *Id.* at 196. The *Bowers* majority analyzed the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” *Id.* at 190. The

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1 *Bowers* majority permitted the state to punish private sexual behavior, relying upon its twin
2 conclusions that such individual rights were not deeply rooted in this Nation's history and
3 tradition, nor were they implicit in the concept of ordered liberty. *Id.* at 194. The majority
4 therefore condoned the state imposing criminal punishments upon its citizens for merely
5 engaging in consensual sexual conduct in the privacy of their home. *Id.* at 196.

6 Four justices dissented in *Bowers*. They rejected how the majority framed the issue
7 as whether there is "a fundamental right to engage in homosexual sodomy." *Id.* at 199
8 (Blackmun, J., dissenting) Rather, Justice Blackmun wrote in his dissent, *Bowers* was
9 "'about the most comprehensive of rights and the right most valued by civilized men,'
10 namely, 'the right to be let alone.'" *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438,
11 478 (1928) (Brandeis, J., dissenting)). Indeed, Justice Blackmun concluded that the statute in
12 *Bowers* "denies individuals the right to decide for themselves whether to engage in particular
13 forms of private, consensual sexual activity." *Id.* Justice Blackmun thus dissented because
14 "depriving individuals of the right to choose for themselves how to conduct their intimate
15 relationships poses a far greater threat to the values most deeply rooted in our Nation's
16 history than tolerance of nonconformity could ever do." *Id.* at 214.

17 The echoes of Justice Blackmun's dissent in *Bowers* ring through Justice Kennedy's
18 majority opinion in *Lawrence*. In *Lawrence*, the Supreme Court struck down Texas's state
19 law prohibiting two persons of the same sex from engaging in certain intimate sexual conduct
20 as violating the Due Process Clause of the Fourteenth Amendment. 539 U.S. at 578.

21 The *Lawrence* Court found that the majority opinion in *Bowers* "fail[ed] to appreciate
22 the extent of the liberty at stake" and "misapprehended the claim of liberty there presented to
23 it. *Id.* at 567. Just like the State in this case tries to limit Plaintiffs claim to be about the
24 "right to engage in prostitution or to solicit prostitution" (Motion, p. 2), the *Bowers* majority
25 limited the issue there presented to be whether the Constitution confers "a fundamental right
26 upon homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 560 (quoting *Bowers*, 478
27 U.S. at 190). *Lawrence* rejects such myopic views of liberty.

1 Instead, *Lawrence* recognizes an “emerging awareness that liberty gives substantial
 2 protection to adult persons in deciding how to conduct their private lives in matters
 3 pertaining to sex.” *Id.* at 559; *see also Skinner v. Oklahoma*, 316 U.S. 535 (1942) (the right to
 4 have children); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to use
 5 contraception); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Carey v.*
 6 *Population Services Int'l*, 431 U.S. 678 (1971) (distribution of contraception); *Roe v. Wade*,
 7 410 U.S. 113 (1973) (the right to have an abortion); *Planned Parenthood of Southeastern Pa.*
 8 *v. Casey*, 505 U.S. 833 (1992) (abortion).

9 As evidence of this emerging recognition of the liberty interest in deciding how to
 10 conduct one’s private life in matters pertaining to sex, the *Lawrence* Court noted, among
 11 other things, that as early as 1955, “[t]he American Law Institute promulgated the Model
 12 Code and made clear that it did not recommend or provide for ‘criminal penalties for
 13 consensual sexual relations conducted in private.’” *Lawrence*, 539 U.S. at 572 (citing ALI,
 14 Model Penal Code §213.2, Comment 2, p. 372 (1980)). Thus, the fact that the Texas statute
 15 proscribed homosexual conduct was not integral to the Court’s decision in *Lawrence*; rather,
 16 the Court’s focus was on the fact that the State of Texas had provided for “criminal penalties
 17 for consensual sexual relations conducted in private.” Texas was intruding into an intimate
 18 sphere of the petitioners’ lives “where the State should not be a dominant presence.” *Id.* at
 19 562. Criminal penalties for consensual sexual relations conducted in private violate “a
 20 promise of the Constitution that there is a realm of personal liberty which the government
 21 may not enter.” *Id.* at 578 (citing *Casey*, 505 U.S. 833, 847 (1992)). And because of this
 22 Constitutional promise, “[t]he State cannot demean [a person’s] existence or control their
 23 destiny by making their private sexual conduct a crime.” *Id.* at 578.

24 Justice Scalia dissented in *Lawrence*. To him, the *Bowers* majority had correctly
 25 analyzed the issue. He wrote that “[s]tate laws against bigamy, same-sex marriage, adult
 26 incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise
 27 sustainable only in light of *Bowers*’ validation of laws based on moral choices. ***Every single***
 28

1 *one of these laws is called into question by today's decision.*" *Id.* at 590 (Scalia, J.,
 2 dissenting) (emphasis supplied). Justice Scalia's dissent has proven a prescient harbinger:
 3 bans on same-sex marriage have already been struck down in this Circuit. *See Latta v. Otter*,
 4 771 F.3d 456, 479 (9th Cir. 2014) (citing *Lawrence*, 539 U.S. at 578) ("When Idaho tells
 5 Idahoans or Nevada tells Nevadans that they are not free to marry the one they love if that
 6 person is of the same sex, it interferes with the universal right of *all the State's citizens* –
 7 whatever their sexual orientation – to 'control their destiny.'") (emphasis in original).

8 In its Motion, the State characterizes *Lawrence* as a decision only about homosexual
 9 sodomy, with no broad-reaching impact on citizens' liberty interests in matters pertaining to
 10 sex. (*See* Motion, p. 11). Yet, remarkably, the State makes no reference to how *Lawrence*
 11 has impacted the many same-sex marriage cases. *See, e.g., Latta, supra.* And the State
 12 wholly ignores *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738 (5th Cir. 2008), in which the
 13 Fifth Circuit applied *Lawrence* and found unconstitutional a Texas law that prohibited the
 14 "selling, advertising, giving, or lending of a device designed or marketed for sexual
 15 stimulation." There, the majority held that the court's job was to "apply *Lawrence*," and
 16 recognize the establishment of a "right to sexual privacy." *Id.* at 745 n.32; *c.f. Williams v.*
 17 *Morgan*, 478 F.3d 1316 (11th Cir. 2007). As the *Reliable Consultants* Court explained:

18 The right the Court recognized was not simply a right to engage in the
 19 sexual act itself, but instead a right to be free from governmental intrusion
 20 regarding "the most private human contact, sexual behavior." That
 21 *Lawrence* recognized this as a constitutional right is the only way to make
 22 sense of the fact that the Court explicitly chose to answer the following
 question in the affirmative: "We granted certiorari ... [to resolve whether]
 petitioners' criminal convictions for *adult consensual sexual intimacy* in the
 home violate their vital interests in liberty and privacy protected by the Due
 Process Clause of the Fourteenth Amendment."

23 *Id.*, 517 F.3d at 744 (citing *Lawrence*, 539 U.S. at 564) (emphasis in original).

24 Laws criminalizing consensual, adult, sexual activity that occurs in private – even if it
 25 occurs for compensation – should suffer the same fate as laws criminalizing homosexual
 26 sodomy, same-sex marriage, and the purchase of sexual devices. Under *Lawrence*, they
 27 intrude on a citizen's liberty interest in deciding how to conduct themselves in matters

1 pertaining to sex. They demean people's existence. They prevent people from "controlling
2 their own destinies." They are therefore unconstitutional.

3 **II. The State incorrectly claims that this is a case about commerce and not about a**
4 **person's fundamental liberty interest in deciding how to conduct his or her**
5 **private life in matters pertaining to sex.**

6 Under the State's reasoning, Cal. Pen. Code § 647(b) implicates no constitutional
7 liberty interest because it supposedly only proscribes commerce, not sex. (*See* Motion, p. 8).
8 The State characterizes the statute as merely criminalizing the sale of sex. But this argument
9 relies upon the false premise that a state may criminalize any commercial transaction, even if
10 the commercial transaction implicates a fundamental liberty interest of the citizenry. This
11 argument is not new, and it has been repeatedly rejected by the Supreme Court.

12 In many cases, the ability to enjoy or exercise basic rights requires a person to buy,
13 sell, or otherwise commercially interact with other citizens. The Constitution's protection of
14 a fundamental right would in most cases be meaningless if a citizen is barred from paying or
15 receiving money in the exercise of that right. American jurisprudence provides ample
16 examples in which courts have intervened to set aside purported "regulations of commerce"
17 that effectively thwarted the citizen's exercise of a fundamental right. For example:

18 (1) the right to obtain an abortion would be meaningless if it were completely
19 illegal to pay a doctor to perform the procedure (*See Roe v. Wade*, 410 U.S. 113 (1973));

20 (2) the right to use contraception would be meaningless if it were completely
21 illegal to sell and distribute contraception (*See Carey v. Population Services, Int'l*, 431 U.S.
22 678 (1971) and other cases discussed, *infra*);

23 (3) the right to keep and bear arms would be meaningless if it were completely
24 illegal to purchase and sell arms (*See Illinois Ass'n of Firearms Retailers v. City of Chicago*,
25 961 F. Supp. 2d 928, 936-8 (N.D. Ill. 2014) and other cases discussed, *infra*);

26 (4) the right to freedom of the press would be meaningless if it were completely
27 illegal to sell newspapers (*See Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452
28 U.S. 640, 647 (1981)); and even

(5) the right to engage in political speech would be meaningless if it were completely illegal to give money to political candidates and organizations. *See Buckley v. Valeo*, 424 U.S. 1, 17 96 S., Ct. 612 (1976).

It is thus clear that the existence of a fundamental right carries with it a co-existent right to engage in such transactions as are necessary to enjoy or exercise such a right.

A. Recent Second Amendment cases demonstrate that individuals have a right to engage in commerce to exercise their constitutional rights.

Recent cases discussing the exercise of Second Amendment rights are particularly illustrative of the connection between commerce and fundamental rights. In many of these Second Amendment cases, courts have held that restrictions on the sale of firearms are unconstitutional because the commercial restriction effectively prevents the exercise of the fundamental right to keep and bear arms.

In *Silvester v. Harris*, the court observed self-evidently that “[t]he right to keep and bear arms necessarily involves the right to purchase them.” 41 F. Supp. 3d 927, 962 (E.D. Cal. 2014). That court held that a restriction “which impose[s] a 10-day waiting period between purchase and delivery burdened conduct protected by the [Constitution]...since [the restrictions] prohibited every person who purchased a firearm from taking possession of that firearm for a minimum of 10 days, one could not exercise the right to keep and bear arms without actually possessing a firearm.” *Id.* at 961-62.

When analyzing such restrictions, many courts make no distinction between the fundamental right at issue and the means of commerce necessary to exercise that right. *See U.S. v. Decastro*, 682 F.3d 160, 169 (2d Cir. 2012) (engaging in analysis of statute affecting “the fundamental right *to obtain* a firearm sufficient for self-defense”) (emphasis added); *Kampfer v. Cuomo*, 993 F. Supp. 2d 188, 195 (N.D. N.Y. 2014) (“fundamental right *to obtain* a firearm...”); *State v. DeCiccio*, 105 A.3d 165, 203 (Conn. 2014) (analyzing “the ability *to acquire* a firearm”); *Illinois Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 936-38 (N.D. Ill. 2014) (reviewing history of regulation of *sale and transfer* of

firearms) (“[T]he ban on gun sales and transfers prevents Chicagoans from fulfilling, within the limits of Chicago, the *most fundamental* prerequisite of legal gun ownership—that of simple acquisition.”) (emphasis in original).

Thus, state laws ostensibly regulating a transaction but which actually limit the exercise of a fundamental right must be subject to the same analysis as those that restrict the fundamental right itself. A fundamental right carries with it the necessary ability to exercise the right through attendant commercial transactions.

B. Cases concerning the right to privacy also show that individuals have a right to engage in commerce to exercise their constitutional rights.

In cases establishing the right to privacy, the right to purchase, sell, and communicate in pursuit of the right has been repeatedly upheld. Outright prohibitions on commercial transactions necessary to give effect to the right to privacy are constitutionally impermissible.

This question is addressed most directly in *Carey v. Population Services Int’l*, 431 U.S. 678 (1977). In *Carey*, the state attached criminal penalties for unlicensed *sale* (not use) of contraceptives. The plaintiff in *Casey* was a corporation engaged in sale of contraceptives. The state in that case drew the same distinction that the State offers in the present case: that even if the citizen has a fundamental right to use contraception, the state was nonetheless free to regulate the sale of the products. *See id.* at 686-87.

Despite the state’s argument in *Carey* that the criminal statute at issue was no more than a regulation on manufacture and sale, the *Carey* Court rejected the state’s argument and invalidated the law under the Due Process Clause of the Fourteenth Amendment. *Id.* at 687. The Court found that the prohibition on sale of contraceptives unduly burdened fundamental rights, and that the right to use the devices was inexorably intertwined with the right to acquire contraceptives. *Id.* at 688. “This is so not because there is an independent fundamental ‘right of access...’, but because such access is essential to exercise the constitutionally protected right...” *Id.* The Court noted that a law limiting access to the

1 means of effectuating a fundamental right is subject to the same legal test as a law
2 prohibiting the exercise of the right. *Id.*

3 The same principle emerges from other cases which delineate the fundamental right
4 of privacy. In *Griswold*, the appellants were the Executive Director of Planned Parenthood,
5 an organization engaged in the distribution and sale of contraceptives, and a physician. The
6 appellants did not themselves assert the right to use contraception, but rather they were third
7 parties who proposed to assist married couples by providing access to contraceptives. *Id.* 381
8 U.S. at 480-81. Thus, the appellants asserted the right to engage in a transaction, for money,
9 in furtherance of a fundamental right to privacy. And even though the case involved this
10 commercial aspect, the Court still found that the convictions violated the Due Process
11 Clause. *Id.* at 485-86.

12 In *Eisenstadt*, the appellee was an educator on contraception. 405 U.S. at 440 (1972).
13 He was convicted for exhibiting and distributing articles relating to contraception. *Id.* Again,
14 the appellee did not assert his own right to privacy as a user of contraception; rather, he was
15 convicted for transacting in contraceptives. Nevertheless, the *Eisenstadt* Court invalidated
16 his conviction, holding that the criminal statute infringed upon a fundamental right.

17 In both *Griswold* and *Eisenstadt*, the Court held that the Due Process Clause provided
18 a right of privacy which included not just the right to use contraception, but the right to
19 obtain the product. In *Carey*, the litigant established the right to sell the product for money.
20 The protections recognized by these three cases run not just to an individual whose privacy is
21 at stake, but extend to another party to a transaction in which privacy is invoked. Thus, the
22 State's argument in this case (i.e. that it is simply regulating commerce) holds no water.

23 **III. *Glucksberg, Raich, and IDK, cited by the State, do not control this case.***

24 Because the State refuses to accept that *Lawrence* controls this case, it argues instead
25 that *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Raich v. Gonzales*, 500 F.3d 850
26 (9th Cir. 2007), "are controlling, and require dismissal of this case." (Motion, p. 9).
27 However, both of these cases are distinguishable, and neither renders *Lawrence* inapplicable.
28

1 Factually, *Glucksberg* and *Raich* are distinguishable from the present case because
 2 the rights at stake in those cases – assisted suicide and medical marijuana – do not implicate
 3 the fundamental liberty interest of adult persons in deciding how to conduct their private
 4 lives in matters pertaining to sex. *Lawrence*, on the other hand, does.

5 More fundamentally, however, *Glucksberg* does not control the present case because
 6 it uses a method for identifying fundamental rights that was plainly disregarded by the
 7 *Lawrence* Court. As the State correctly notes (*See* Motion, p. 7), under *Glucksberg*, a court
 8 will recognize a fundamental right only when it is: (1) carefully defined; and (2) objectively,
 9 deeply rooted in this Nation’s history and tradition and implicit in the concept of ordered
 10 liberty. *Glucksberg*, 521 U.S. at 721. Commentators have referred to this method as the
 11 “Glucksberg Two-Step”, and have criticized it because, among other things, “a court may
 12 rule however it wishes simply by choosing how to describe the right.” *See* Randy E. Barnett,
 13 *Scrutiny Land*, 106 Mich. L. Rev. 1479, 1490 (2008).

14 Without directly explaining why, the *Lawrence* court flatly ignored the Glucksberg
 15 Two-Step. In fact, the majority opinion in *Lawrence* does not even cite to *Glucksberg*. One
 16 could plausibly surmise that *Lawrence*’s failure to so much as reference *Glucksberg* or its
 17 method for identifying fundamental rights is attributable to the fact that *Glucksberg* derived
 18 its method from *Bowers*, which *Lawrence* overruled. *See Bowers* 478 U.S. at 191-92.
 19 Regardless of the reason for the analytical shift from *Glucksberg* to *Lawrence*, *Lawrence* is
 20 the more recent case and therefore controls.

21 Departing from the Glucksberg Two-Step, the *Lawrence* Court eschewed a reliance
 22 upon history and tradition in favor of an inquiry focused upon the liberty interest at issue.

23 It must be acknowledged * * * that for centuries there have been powerful
 24 voices to condemn homosexual conduct as immoral. The condemnation has
 25 been shaped by religious beliefs, conceptions of right and acceptable
 26 behavior, and respect for the traditional family. * * * These considerations
 27 do not answer the question before us, however.
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1 *Lawrence*, 539 U.S. at 571 (citing *Casey*, 505 U.S. 833, 850 (1992)). The *Lawrence* Court
2 never deemed it necessary to address the level of “scrutiny” that it was applying in the case.
3 “Instead, it rejected an open-ended conception of the police power of states and found that
4 the particular purpose of the statute was illegitimate or improper.” Barnett, *supra*, 106 Mich.
5 L. Rev. at 1495; *see also Reliable Consultants, Inc.*, 517 F.3d 738, 746 (5th Cir.
6 2008)(omitting any use of the Glucksberg Two-Step and noting that the court’s standard was
7 simply to “apply *Lawrence*” to the statute making it a crime to sell sexual devices).

8 The other two cases cited by the State as purportedly requiring dismissal of this case
9 are also not controlling. The *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007) opinion
10 concerning the Due Process Clause that is cited by the State came from the Ninth Circuit, not
11 the Supreme Court. It did not overrule or supersede *Lawrence*, nor could it have. Finally,
12 the State suggests that *IDK, Inc. v. County of Clark*, 836 F.2d 1185 (9th Cir. 1988) disposes
13 of the issues raised in the present case. *IDK* was 2-1 decision from the Ninth Circuit in 1988,
14 rendered well before the Supreme Court’s rulings in *Casey* and *Lawrence*. It involved escort
15 services’ constitutional challenge to a county’s licensing regulation – it was not a challenge
16 to the complete prohibition on certain intimate conduct as in this case. *See id.*, 836 F.2d at
17 1187. And the *IDK* Court’s factual findings about “[t]he relationship between escort and
18 client” that the State cites to in its Motion were made at the summary judgment stage. Those
19 factual findings were therefore unique to that case’s factual record. And provide no basis to
20 dismiss this case as a matter of law under Fed. R. Civ. P. 12(b)(6). Thus, neither *Glucksberg*,
21 *Raich*, or *IDK* require dismissal of this case.

22 **IV. The interests that the State claims Section 647(b) advances do not warrant the**
23 **outright prohibition of consensual, adult, sexual activity that occurs in private,**
24 **even if it occurs for compensation.**

25 The State claims that the Section 647(b) relates to the State’s purported interests in:
26 (1) deterring human trafficking and coercion; (2) deterring violence against prostitutes; (3)
27 deterring the spread of AIDS and venereal disease; (4) deterring crimes incidental to
28 prostitution; and (5) deterring commodification of sex. (*See Motion*, pp. 11-13). This

1 argument draws upon factual assertions that cannot be considered upon a motion to dismiss
 2 and therefore should not be considered by this Court. (*See, e.g., Arpin v. Santa Clara Valley*
 3 *Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001)). Nevertheless, to the extent the Court
 4 wishes to entertain such arguments, Plaintiffs address them below.

5 The State's five purported interests in criminalizing prostitution can be lumped into
 6 three categories: (1) deterring independent criminal offenses; (2) deterring the spread of
 7 disease; and (3) deterring "commodification of sex".

8 As to the independent criminal offenses referenced by the State, every single one of
 9 them is already separately prohibited as a crime in California. Thus, regardless of whether
 10 the State criminalizes prostitution, it already has the ability to investigate, arrest, and
 11 criminally punish any person who commits any of the acts in which the State asserts an
 12 interest. None of these reasons therefore provide any independent basis to criminalize
 13 consensual sexual activity that occurs in private. Still, the State offers the deterrence of these
 14 independent crimes as a pretext for criminalizing constitutionally-protected behavior.

15 As to the second interest advanced by the State, the current criminal prohibition of
 16 prostitution only serves to increase the spread of STIs. However, separate and apart from
 17 this fact, the outright ban on prostitution no more prevents the spread of STIs than would the
 18 outright ban on homosexual sodomy or, for that matter, sex in general. But *Lawrence* makes
 19 clear that the state cannot criminalize sex. *See* Section I, *supra*. Texas could not have
 20 justified its ban on homosexual sodomy by claiming an interest in deterring the spread of
 21 STIs, and California similarly cannot justify its ban on prostitution on that ground.

22 Lastly, the State dances around the fact that the State normatively disagrees with the
 23 way in which Plaintiffs desire to conduct their private lives in matters pertaining to sex. The
 24 State prefers to claim that there is a state interest in "deterring commodification of sex"
 25 rather than bluntly stating that the State finds the exchange of money for sexual activity to be
 26 immoral. Assuredly, the State has good reason for this verbal legerdemain – under
 27 *Lawrence*, "the fact that a State's governing majority has traditionally viewed a particular
 28

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practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” *Lawrence*, 539 U.S. at 560. But this diction does not escape the fact, as alleged in the Complaint, that Section 647(b) was enacted with no justification other than the State’s moral disapproval of the sexual conduct. (*See* Complaint ¶17). The law’s draftsman did “not offer any rationale for section 647(b), unlike the section’s other subdivisions, beyond remarking that ‘the pimp, the panderer, and the prostitute cannot be permitted to flaunt their services at large.’” (*Id.*) (internal citations omitted); *see also Coyote Publishing, Inc. v. Miller*, 598 F.3d 592, 605 (9th Cir. 2010) (“The sale of sex was not widely criminalized for much of our nation’s history. Prostitution was instead covered only by prohibitions on vagrancy and ‘streetwalking’; the bans did not extend to brothels or other indoor locations in which sale of sex occurred.”) (internal citations omitted); *Bailey v. U.S.*, 98 F.2d 306, 308 (D.C. Cir. 1938) (noting that at common law prostitution was not itself an indictable offense).

Under *Lawrence*, this moral disapproval, evidenced by the statute’s own drafter, is a patently insufficient justification for the law. And couching the moral disapproval as the State having an interest in “detering commodification of sex” does not change that fact. Therefore none of the interests offered by the State, whether deterring independent crime, deterring the spread of STIs, or finding the conduct in question to be immoral, provides any legitimate basis for the State to trounce upon Plaintiffs’ fundamental rights.

V. Plaintiffs’ free speech claim is not subject to dismissal.

The State’s argument for dismissing Plaintiff’s free speech claims under the First Amendment is entirely premised on the belief that the commercial exchange of private sexual activity is an illegal activity. (*See* Motion, p. 13). The State is correct in noting that a state may ban commercial speech related to an illegal activity. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980)(*citing Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 388 (1973)). However, as explained in Section I, *supra*, the State cannot constitutionally make the commercial exchange of private sexual activity a crime. As a result, the State also cannot constitutionally criminalize speech

relating to the commercial exchange of private sexual activity. The State's argument relating to Plaintiff's free speech claim is therefore not well taken.

VI. Plaintiff's freedom of association claim is not subject to dismissal.

The Supreme Court has issued decisions referring to constitutionally protected "freedom of association" in two distinct senses. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984). The first sense involves a freedom of intimate association which provides a right to enter into certain intimate relationships (*Id.* at 617-18), the second sense involves a right to expressive association. *Id.* at 618. In its Motion, the State only addressed the right to expressive association, not the right to intimate association. (*See* Motion, pp. 13-14).

"[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* (i). "The freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). "[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts*, 468 U.S. at 617-18.

To determine whether a particular relationship is protected by the right to intimate association the court should look to "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1220-21 (9th Cir. 2012). The association at issue in the present case constitutes such an intimate relationship. It is of a small size and each party is able to exercise selectivity in choosing their partners. Likewise, the parties in an intimate sexual relationship have the right to maintain exclusivity in their choices.

For all of these reasons, California's criminalization of prostitution impermissibly interferes with Plaintiffs' right of association.

VII. The Plaintiffs have a protectable property interest in their desired profession and a substantive due process right to engage in it.

The Plaintiffs have adequately pleaded a claim for a violation of their due process, and the State's argument for dismissal of this claim is an entirely circular syllogism that fails to establish that there is no set of facts under which Plaintiffs can prevail as a matter of law.

The State's argument is simple. When Plaintiffs challenge Section 647(b) claiming that it infringes upon their right to earn a living, the State responds that Plaintiffs have no protected right to earn a living because their chosen profession is illegal under Section 647(b). Ergo, according to the State, Plaintiffs cannot challenge Section 647(b) because Section 647(b) criminalizes their conduct. This argument begs the question that is posed by Plaintiffs' claims. The State's argument would foreclose any request for judicial review of a criminal statute under any circumstances and ignores the basic tenet of due process jurisprudence stated in *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

The 'liberty' mentioned in the [Fourteenth] Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person ... but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above-mentioned.

The position offered by the State is brazen in its simplicity, but similarly clear in its flaw. Its argument is entirely conclusory and does not dispose of Plaintiffs' claim.

VIII. Plaintiffs' claims under the California Constitution.

The State moves to dismiss Plaintiffs' claim under the California Constitution because of the Eleventh Amendment. Plaintiffs do not oppose this request.

IX. Plaintiffs' as-applied challenge does not fail.

The State makes two arguments to dismiss Plaintiffs' as-applied challenge. First, the State offers the derivative argument that because, according to the State, Plaintiffs' facial challenge must fail, so too must Plaintiffs' as-applied challenge fail. (*See Motion*, p. 16).

1 However, as demonstrated above, Plaintiffs' facial challenge cannot be dismissed as a matter
2 of law and, thus, neither can Plaintiffs' as-applied challenge.

3 Second, the State argues that Plaintiffs' as-applied challenge should be dismissed
4 because the Plaintiffs' claims are "speculative and not ripe". (Motion, p. 17). The State asks
5 this Court to believe that Plaintiffs would actually have to violate Section 647(b) for them to
6 state a cognizable as-applied challenge. This is not the case. Plaintiffs are parties "against
7 whom these criminal statutes directly operate...." *Doe v. Bolton*, 410 U.S. 179, 188 (1973).
8 "[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not
9 imaginary or wholly speculative, a plaintiff need not 'first expose himself to actual arrest or
10 prosecution to be entitled to challenge [the] statute.'" *Id.* (quoting *Steffel v. Thompson*, 415
11 U.S. 452, 459 (1974)). Thus, Plaintiffs' as-applied challenge is ripe for review. *Wilson v.*
12 *Stocker*, 819 F.2d 943, 946–47 (10th Cir. 1987).

13 **X. Conclusion.**

14 The Court should deny the Defendants' Motion to Dismiss.

15 Respectfully submitted,

16 Dated: June 8, 2015

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